A

RISASA INDUSTRY (M) SDN BHD

v.

MALAYSIAN INDUSTRIAL DEVELOPMENT FINANCE BHD & ANOR

B

HIGH COURT MALAYA, ALOR STAR
MOHD SOFIAN ABD RAZAK J
[ORIGINATING SUMMONS NO: 24-164-2006]
24 JULY 2008

C

COMPANY LAW: *Receiver and manager - Validity of appointment - Whether in accordance with s. 186(1) and (2) Companies Act 1965 - Whether writ of distress taken out lawful*

D

The plaintiff had defaulted in its loan repayment to the first defendant and the first defendant in exercise of its powers as contained in a debenture appointed the second defendant as receiver and manager. The plaintiff made an application for declarations, namely, that the appointment of the receiver and manager and the ensuing writ of distress taken out were null and void.

E

Held (dismissing plaintiff's application):

(1) The relevant exhibits showed that the appointment of receiver and manager was in accordance with s. 186(1) and (2) of the Companies Act 1965 ('CA'). (para 32)

F

(2) The plaintiff had the *locus standi* to institute the proceedings against the defendants. The appointment of a receiver and manager by debenture holders has no effect whatsoever upon the position of the main officers of the company, the directors and the secretary. That was so even if the receiver and manager was the agent of the debenture holders or of the company or was himself a principal (*Moss Steamship Co Ltd v Whinney*). The corporate structure of the company remains unimpaired and although the management and control of the assets comprised in the appointment is thereby taken completely out of the hands of the officers of the company, they remain as officers with all the statutory duties to discharge. There is nothing to prevent the directors causing the company to bring an action against the receiver and manager for improper discharge of its duties. (paras 33, 34 & 35)

G

H

I

(3) The proceedings taken could not be a derivative or a representative action. A derivative action is where the plaintiff brings an action for himself as a shareholder and on behalf of the other shareholders for the benefit of the company of which he is a shareholder. It is usually brought by a minority shareholder on behalf of himself and all other shareholders of the company other than the defendants. The wrongdoers and the company must be cited as defendants. In order to bring a derivative action, a minority shareholder must show that those wielding majority control abused the powers vested in them by not using their powers for the true purpose for which the power was entrusted to them, either by the memorandum and the articles of association, by statute or the general law. (para 37)

(4) The facts did not disclose that the minority shareholders were willfully oppressed by the majority shareholders. There was also no dispute amongst the plaintiff's shareholders. The issue was whether the appointment of the second defendant as receiver and manager was valid and in compliance with the requirement of s. 186(1) and (2) CA and whether the receiver and manager exceeded its authority in carrying out its duties. (para 38)

(5) The plaintiff failed to show that the receiver and manager acted fraudulently or in *mala fides* in discharging its fiduciary duties to the company. Also, when the writ of distress was filed, the receiver and manager was legally appointed and duly authorised to affirm the affidavit-in-support. It followed that the appointment of the receiver and manager was in compliance with s. 186(1) and (2) CA. The receiver and manager in exercise of its duties did not exceed the powers as provided for in the debenture. The allegations made by the plaintiff were without basis. (paras 42, 43 & 44)

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Cocoa Processors Sdn Bhd v. United Malayan Banking Corporation Bhd & Ors [1988] 1 LNS 120 ***(refd)***

Expo International Pty Ltd (in liq) v. Chant [1980] 4 ACLR 679 ***(refd)***

Hawkesbury Development Co Ltd v. Landmark Finance Pty Ltd [1969] 92 WN (NSW) 199 ***(refd)***

Hui Huat v. Datuk Khoo Eng Choo & Ors [1999] 4 CLJ 777 HC ***(refd)***

Jaffe Ltd v. Jaffe & Other [1931] Gazette Law Reports 171 ***(refd)***

A *Kasofsky v. Kreegers [1937] All ER 374* ***(refd)***
Moss Steamship Co Ltd v. Whinney [1912] AC 254 ***(refd)***
Re B Johnson & Co (Builders) Ltd [1955] 2 All ER CA ***(refd)***
Tan Ah Teck v. Coffral (M) Sdn Bhd [1991] 3 CLJ 2227; [1991] 4 CLJ (Rep) 63 HC ***(refd)***
B *Watts v. Midland Bank plc [1986] BCCC 15* ***(refd)***

Legislation referred to:
Companies Act 1965, s. 186(1), (2)

For the plaintiff - M/s Johari Nasri & Tan
C *For the 1st defendant - M/s Sidek Teoh Wong & Dennis*
For the 2nd defendant - M/s Rama Samuel & Assoc

Reported by Usha Thiagarajah

D

JUDGMENT

Mohd Sofian Abd Razak J:

[1] This is the plaintiff's application (encl. 1) dated 5 February
E 2006 made pursuant to s. 186(1) and (2) of the Companies Act 1965 respectively and supported by an affidavit of support (encl. 2) affirmed on the same dated as encl. 1. The prayers in encl. 1 are as follows namely:

F 1. a declaration that the appointment of receiver and manager by the first defendant on 2 August 2004 was invalid and null and void.

2. a declaration that the second defendant's action in instituting a writ of distress *vide* Originating Application No: 54-3-2005
G at the Session Court, Sungai Petani was invalid and null and void.

3. that the costs be borne by the first and second defendants.

H **[2]** The grounds for the application are as follows:

(a) that the appointment of receiver and manager was not duly registered with the Companies Commission of Malaysia pursuant to s. 186(1) and (2) of the Companies Act 1965 respectively.

I

(b) that the receiver and manager in instituting the writ of distress contravened the powers provided for by the debenture.

(c) that the costs of this application be borne by the first and second defendants and to be assessed by the court.

(d) any other relief deem fit and proper by the Honourable Court in the circumstances.

The Factual Background

[3] On 16 May 1997, the plaintiff entered into loan agreement together with a deed of debenture with the first defendant for the purpose of assisting the plaintiff to purchase the machinery and equipment as described in the First Schedule of the deed of debenture which is annexed hereto as exh. 'SA1' (hereinafter called 'the debenture"). The said loan applied by the plaintiff was for the sum of RM440,400 (hereinafter called 'the loan'). It was not disputed that Article XI of the debenture provides remedies to the first defendant that if there were any events of default by the plaintiff, the first defendant was empowered *inter alia* to appoint a receiver and manager.

[4] The plaintiff had defaulted in its loan repayment to the first defendant and the first defendant in exercise of its powers under Article 11.2 of the debenture had appointed the second defendant as a receiver and manager on 2 August 2004 pursuant to a letter dated 5 August 2004, which is marked as exh. 'SA2'.

[5] The plaintiff on the issue of the appointment of a receiver and manager submitted that the appointment was invalid and null and void as it did not comply with s. 186(1) and (2) of the Companies Act 1965, (hereinafter called 'the Act'). The first and the second defendants think otherwise.

[6] In the meanwhile, the receiver and manager had taken a writ of distress against the plaintiff's tenant namely Messrs. Syarikat Stanton Industries (M) Sdn Bhd who was renting the premises belonging to the plaintiff to recover the arrears in rental amounting to the sum of RM66,000. The plaintiff submitted that the writ of distress against the tenant was unlawful, and void, however, the first and second defendants think otherwise.

A **The Plaintiff's Submission**

[7] The learned counsel for the plaintiff submitted that the appointment of a receiver and manager by the first defendant was invalid and null and void. Furthermore, the action by the receiver and manager exceeded the powers as contained to in the debenture for the following reasons namely:

1) (a) That the first defendant failed to register the said appointment with the Companies Commission with seven days after he had obtained the order or made the appointment lodge notice of the fact with the registrar pursuant to s. 186(1) of the Act.

(b) That the second defendant had also failed to comply with s. 186(2) of the Act.

[8] The learned counsel for the plaintiff referred to s. 186(1) and (2) of the Act and submitted that the word 'shall' used in both the subsections in the Act should be construed as mandatory that the registration shall be registered within seven (7) days from the date thereof.

[9] It was further submitted by the learned counsel for the plaintiff that since there was no registration made within the seven days from the date of the appointment, it follows that the purported appointment was invalid and null and void.

2) That the second defendant had no powers to institute the writ of distress for the following reasons namely:

(i) Clause 11.3 of the debenture dated 16 May 1997 (exh. SA1) only give powers to the second defendant as receiver and manager to deal with the machinery charged by the plaintiff as floating or fixed charge to the first defendant. Clause 11.3.5 of the debenture only permits the receiver and manager to remove, defend, withdraw any action, summons or proceedings whether civil or criminal in relation to the properties and assets charged by the plaintiff to the first defendant only.

(ii) that the leave to institute the writ of distress was given on 28 March 2005 whereas the registration of the appointment as receiver and manager with the Companies Commission Malaysia was on 29 March 2005.

(iii) that the affidavit-in-support of the writ of distress affirmed by Chong Kee Hong was on 18 March 2005 and the said Chong Kee Hong had no authority to carry out the duties as a receiver and manager.

(iv) that the writ of distress on Syarikat Stanton Industries (M) Sdn Bhd by the second defendant was invalid and null and void because the proceedings was instituted before the second defendant was appointed as receiver and manager. The affidavit-in-support affirmed by the receiver and manager who had ceased at the time the order for distress was granted on 4 April 2005.

The First Defendant's Submission

[10] The learned counsel for the first defendant submitted that by reasons of the fact that the plaintiff was a private limited company under receivership, the plaintiff had no right and power to institute this proceeding in the name of the plaintiff company without the consent and approval from the receiver and manager who was at all material time, the second defendant.

[11] The learned counsel for the first defendant further submitted the present proceedings should be instituted in the name of Syed Ahmad bin Syed Abu Bakar personally as director and coupled with the fact that the said Syed Ahmad bin Syed Abu Bakar failed to indicate whether he had the power to depose the affidavit for and on behalf of the plaintiff company.

[12] The learned counsel for the first defendant in support of his contention cited the case of *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551 where Gopal Sri Ram JCA states that:

> A plaintiff in a derivative action cannot sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company of which he is a shareholder. A minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers and the company must be cited as defendants. The title to the action must reflect that the suit is being brought in a representative capacity. The pleading must disclose that it is a derivative action and recite the facts that make it so. *Further, there must be express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does meet these requirements is liable to be struck out as being frivolous and vexatious.*

[13] The learned counsel for the first defendant was of the view that the proceedings initiated by the plaintiff was in fact a derivative action but nevertheless had failed to comply with the requirements of the law that the company and the wrongdoers must be cited as defendants. The pleading must disclose that it is a derivative action and recite the facts that make it so.

[14] The learned counsel for the first defendant cited the case of *Hui Huat v. Datuk Khoo Eng Choo & Ors* [1999] 4 CLJ 777 to substantiate its argument where *inter alia* the court held that:

> The Plaintiff as a member of the society could only sue the 1st and 2nd Defendants by way of derivative action. However, since the society by virtue of the consent order was estopped from bringing any action against the 1st and 2nd Defendants, the Plaintiff was therefore in capacitated from bringing any action against the 1st and 2nd Defendants. This must be so as a derivative action is not an independent cause of action accruing to the society which individual members can enforce for and on behalf of the society.

[15] On the issue of whether the legal proceedings instituted by the plaintiff did interfere with the receiver's and manager's function, the learned counsel for the first defendant was of the view that it does interfere with the functions of a receiver and manager.

[16] In reply to the other substantive issue raised by the plaintiff in that the appointment of the second defendant was not in compliance with s. 186(1) of the Companies Act 1965, the learned counsel for the first defendant submitted that the first defendant had registered the appointment of the second defendant as a receiver and manager by making reference to exhs. WLH1 and WLH2 respectively. In respect of WLH1 the appointment of Chong Kee Hong was on 3 August 2004 as stated in Form 59 dated 2 August 2004, and duly registered on 3 August 2004. Exhibit WLH2 was the appointment of Sathiea Seelean Manickam on 29 March 2005 as stated in Form 59 dated 29 March 2005 which was to replace Chong Kee Hong as a receiver and manager and duly registered on 4 April 2005. It was further submitted that for both the appointments, they were duly registered within the seven days in accordance to s. 186(1) & (2) of the Companies Act 1965, respectively.

[17] The learned counsel for the first defendant also submitted that the receiver and manager was authorised by virtue of the debenture to realise the company's assets, to distribute the proceeds to the debenture holders in satisfaction of their claim. Reference was made by the learned counsel for the first defendant to the case of *Cocoa Processors Sdn Bhd v. United Malayan Banking Corporation Bhd & Ors* [1988] 1 LNS 120.

The Second Defendant's Submission

[18] The learned counsel for the second defendant submitted that clause 11.2 of the debenture clearly empowered the second defendant as a receiver and manager to realise the company's assets and to distribute the proceed to the debenture holders in satisfaction of their claim. The said appointment of Chong Kee Hong and Sathiea Seelan Manickam respectively were duly registered within seven days with the Companies Commission pursuant to s. 186(1) and (2) of the Act.

[19] The learned counsel for the second defendant further submitted that at the material time when the writ of distress was filed at the Sessions Court, Sungai Petani, Chong Kee Hong was legally appointed as a receiver and manager and was duly authorised to affirm the affidavit-in-support dated 18 March 2005.

[20] It was also submitted that as a receiver and manager, the second defendant was empowered and authorized by clause 11.4 of the debenture to realise the company's assets, to distribute the proceed to the debenture holders in satisfaction of their claim.

The Submission-In-Reply By The Plaintiff

[21] The learned counsel for the plaintiff also provided rebuttal to the submissions by the learned counsel for the first defendant which are as follows:

(i) that the plaintiff had not obtained the consent from the receiver and manager to institute the present proceedings, the learned counsel for the plaintiff submitted that such consent was not required. The appointment of a receiver and manager did not affect the rights of the plaintiff's directors generally and the directors still retain the power to take the appropriate action to protect their other interests if they were affected by the appointment of a receiver and manager. The learned

counsel for the plaintiff cited the case of *Tan Ah Teck v. Coffral (M) Sdn Bhd* [1991] 3 CLJ 2227; [1991] 4 CLJ (Rep) 63 where Wan Yahya J at p. 559 stated that:

> ... did not divest the company's directors of their power to institute proceedings on behalf of the company provided that the proceedings did not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperiling the assets. Furthermore, the directors were under a duty to bring an action which was in the company's interest because it was for the benefit of creditors generally, and to pursue that right of action did not amount to dealing with the company's assets so as to require the receiver's consent or concurrence.

(ii) On the averment by the defendant that the appointment of the second defendant was duly registered with the Companies Commission of Malaysia, the learned counsel for the plaintiff submitted that the plaintiff had no knowledge thereof. This was because the alleged registration made on 3 August 2004 exhibiting the appointment letter as exh. "WLH1" only bore the chop but not the signature of the officer who acknowledged receipt of the registration. That being the case it was further submitted that the registration was not done within the stipulated time frame pursuant to s. 186(1) and (2) of the Companies Act 1965 respectively.

Findings Of The Court

[22] The uncontroverted facts of the instant case is that the plaintiff had defaulted in its loan repayment to the first defendant. Article XI of the debenture in particular clause 11.1 provides the remedies to the first defendant in the event of default. The first defendant in exercise of its powers as contained in the debenture and in particular to clause 11.2 had appointed the second defendant as a receiver and manager.

[23] Clause 11.2:1 of the debenture states as follows:

> MIDF or any person authorised by MIDF may enter into and upon or any land or premises where the assets of the Borrower hereby charged or any of them are without any notice and may take possession and control of the said machinery/equipment in such land and premises and all such assets hereby secured and all properties books of account and documents relating to such assets as are hereby secured.

[24] Clause 11.3 of the debenture stipulates the powers of receiver and manager and who shall be the agent of the borrower and shall have power *inter alia*:

(i) Clause 11.3.1 to take possession of and get in all or any of the assets of the borrower hereby charged.

(ii) Clause 11.3.2 to carry on or concur in carrying on the business of the borrower.

[25] The first defendant in exercise of its rights as a debenture holder had appointed Chong Kee Hong as a receiver and manager on 3 August 2004 and as stated in Form 59 dated 2 August 2004. The Form 59 was duly registered with the Companies Commission on 3 August 2004. This is apparent from from exh. WLH1. The first defendant then appointed Sathiea Seelean Manickam on 29 March 2005 as stated in Form 59 dated 29 March 2005 to replace Chong Kee Chong as a receiver and manager. The said appointment was duly registered with the Companies Commission on 4 April 2005. This is apparent from exh. WLH2.

[26] It is perhaps useful to reproduce the relevant s. 186(1) and (2) of the Companies Act 1965 respectively.

[27] Section 186(1)

> If any person obtains an order for the appointment of a receiver or manager of the property of a company or of the property within Malaysia of any other corporation, or appoints such a receiver or manager under any powers contained in any instrument, he **shall** within seven days after he has obtained the order or made the appointment lodge notice of the fact with the Registrar.

[28] Section 186(2)

> Where any person appointed receiver or manager of the property of a company or other corporation under the powers contained in any instrument ceases to act as such he **shall** within seven days thereafter lodge with the Registrar notice to that effect.

[29] A receiver and manager must for his own protection immediately upon being notified of his appointment (if he wishes to accept it) satisfy himself as to the validity of the appointment itself. In the instant case, the appointment of the receiver and

manager has been questioned by the plaintiff, so the onus is on the receiver and manager to establish the validity of his appointment.

[30] In *Kasofsky v. Kreegers* [1937] All ER 374, where the brief facts of the case was that an execution creditor having seized certain goods of the debtor, the goods were claimed by a receiver appointed under a power given by a debenture deed. The appointment was dated the day after the execution of the deed. It was contended that such appointment was *prima facie* valid, and that it was for the creditor to show that none of the events specified in the deed as giving rise to the power had happened. The court held that it was for the receiver to prove the happening of one of the events so specified in the debenture deed and the *maxim omnia rite esse acta praesumuntur* (no evidence to rebut this presumption) had no application to such a case.

[31] In *Kasofsky v. Kreegers (supra)* the court further held that the events so specified in the debenture deed did not accrue and the appointment of the receiver was prematured and thus it was invalid.

[32] The court in this regard is of the view that having examined the exhs. WLH1 and WLH2, held that the appointment of both as a receiver and manager was in accordance with s. 186(1) and (2) of the Companies Act 1965, respectively. There is no basis for the allegation made by the plaintiff that the said appointment was invalid and null and void for failing to comply with s. 186(1) and (2) of the Act, respectively.

[33] On the issue of whether the plaintiff company had the *locus standi* to institute this proceedings against the first and second defendants respectively. The court is of the considered view that the plaintiff company has *locus standi* to bring this action in the name of the plaintiff company. In *Moss Steamship Co. Ltd v. Whinney* [1912] AC 254 HL where the court held that the main legal effects arising out of a privately – appointed receiver are the same as in the case of a receiver appointed by the court in that:

> The appointment of a receiver by the debenture holders does not end the life of the company. The legal persona of the company will continue to subsist until liquidation. The company is, so to speak, anaesthetized but the receiver may carry on business on its behalf.

[34] The appointment of a receiver by debenture holders has no effect whatsoever upon the position of the main officers of the company, the directors and the secretary and that is so whether the receiver is the agent of the debenture holders or of the company or is himself a principal.

[35] The corporate structure of the company remains unimpaired and although the management and control of the assets comprised in the appointment is thereby taken completely out of the hands of the officers of the company they remain as officers with all the statutory duties to discharge (see *Hawkesbury Development Co. Ltd v. Landmark Finance Pty Ltd* [1969] 92 WN (NSW) 199. There is nothing to prevent the directors causing the company to bring an action against the receiver for improper discharge of his duties (see *Watts v. Midland Bank plc* [1986] BCCC 15, 20-21).

[36] In *Jaffe Ltd v. Jaffe & Other* [1931] Gazette Law Reports 171, where the court held that a plaintiff company could file a motion against the receiver and manager for an account for the loss and damage suffered by reason of the trespass of defendants in purported exercise of their powers under a debenture.

[37] Be that as it may, the court is of the further view that the proceedings taken cannot be a derivative or a representative action. A derivative action is where the plaintiff brings an action for himself as a shareholder and on behalf of the other shareholders for the benefit of the company of which he is a shareholder. It is usually brought by a minority shareholder on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers and the company must be cited as defendants. In order to bring a derivative action a minority shareholder must show that those wielding majority control abused the powers vested in them by using or omitting to use their powers for an oblique or collateral motive or purpose and not for the true purpose for which the power was entrusted to them either by the memorandum and articles of association, by statute or the general law.

[38] The facts of the instant case does not disclose that the minority shareholder had been wilfully oppressed by the majority shareholders which cause the minority shareholder to file any action against the company as a nominal defendant together with the wrongdeors as the other defendants. There is also no dispute

amongst the shareholders of the plaintiff company. The issue here is whether the appointment of the second defendant, as receiver and manager was valid and in compliance with the requirement of s. 186(1) and s. 186(2) of the Act and whether it had exceeded its authority in carrying out his duties.

[39] On the issue raised by the plaintiff that the reciever and manager had exceeded its authority in carrying out his duties, the court would refer to the case of *Re B. Johnson & Co. (Builders) Ltd* [1955] 2 All ER CA, where Jenkins LJ expressed the view that:

> In a word, in the absence of fraud or *mala fides* ... the company cannot complain of any act or mission of the receiver and manager, provided that he does nothing that he is not empowered to do and omits nothing that he is enjoined to do by the terms of his appointment. If the company conceives that it has any claim against the receiver and manager of breach of some duty owed by him to the company, the issue is not whether the receiver and manager has done or omitted to do anything which it would be wrongful in manager of a company to do or omit, but whether he has exceeded or abused, or wrongly omitted to use the special powers and the discretions vested in him pursuant to the contract of loan constituted by debenture for the special purpose of enabling the assets comprised in the debenture holders' security to be preserved and realised.

[40] In *Expo International Pty Ltd (in liq) v. Chant* [1980] 4 ACLR 679, the court examined the principles relating to the duties to the company imposed on receivers which could be summarised as follows:

a) the duty to exercise his powers in good faith;

b) the duty to act strictly within and in accordance with the conditions of his appointment;

c) the duty to account to the company after the debenture holders' security has been discharged not only for surplus assets but also for his conduct of the receivership. This duty involves the duty to terminate the receivership by handing over the surplus assets to the company as soon as the interests of the debenture holders have been satisfied;

d) The duty does not extend to loss caused by negligence provided that loss arose out of a *bone fide* act.

[41] In *Kerr on Receivers* (17th edn), it it also said that with reference to a receiver appointed out of court by the debenture holders of a company that:

> the position and powers of such receivers are derived from and depend upon the contract between the parties expressed in the authorising instrument.

[42] In this regard, the court was of the considered view that the plaintiff had failed to show that the receiver and manager had acted fraudulently or *mala fides* in discharging its fiduciary duties to the company.

[43] The court also takes the view that when the writ of distress was filed at the Sessions' Court Sungai Petani, Chong Kee Hong was legally appointed as a receiver and manager and was duly authorised to affirm the affidavit-in-support dated 18 March 2005.

[44] In conclusion and for the reasons as adumberated earlier, the court finds that the appointment of Chong Kee Hong and Sathiea Seelean Manickam respectively was in compliance with s. 186(1) and (2) of the Act. The receiver and manager in exercise of its duties did not exceed the powers as provided for in the debenture. The court further finds that the allegations made by the plaintiff are without basis. The court hereby dismissed the plaintiff's application (encl 1) with costs.